Supreme Court, U.S.
FILED
JAN 16 19[illegible]
OFFICE OF THE CLERK

(2)

No. 97-1002

In The

Supreme Court of the United States

October Term, 1997

NANCY J. KOBRIN,

Petitioner,

vs.

UNIVERSITY OF MINNESOTA; THE REGENTS OF THE UNIVERSITY OF MINNESOTA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JULIE FLEMING-WOLFE
1654 Grand Avenue
St. Paul, MN 55105
(612) 698-1698

MARK B. ROTENBERG*
General Counsel
University of Minnesota
325 Morrill Hall
100 Church Street S.E.
Minneapolis, MN 55455
(612) 624-4100

Attorneys for Respondents

* *Counsel of Record*

144206

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

17 pp

QUESTION PRESENTED

Whether Petitioner waived her objection to the special master's consideration of her claims at trial because she failed to object until after the special master filed an unfavorable report?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Citations ii

Statement of the Case 1

A. Issues Properly Presented by this Petition for Writ of Certiorari. 1

B. Facts Material to the Court's Consideration of the Questions Presented by this Petition. 3

Reasons for Denying the Writ 5

I. The Issue of When a Waiver Occurs Has Been Clearly Articulated by the Courts and Does Not Merit Reconsideration. 5

II. The Elements of Waiver Were Satisfied in this Case. 8

Conclusion 12

TABLE OF CITATIONS

Cases Cited:

Active Prods. Co. v. A. H. Choitz and Co., 163 F.R.D. 274 (D.C. Ind. 1995) 10

Contents

Page

Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406 (9th Cir. 1990), *cert. denied*, 498 U.S. 1109, 111 S. Ct. 1019, 112 L. Ed. 2d 1100 (1991) 1, 6, 7, 8

Burlington Northern v. Dep't of Revenue, 934 F.2d 1064 (9th Cir. 1991) 1, 6, 7

Constant v. Advanced Micro-Devices, 848 F.2d 1560 (Fed. Cir.), *cert. denied*, 488 U.S. 892, 109 S. Ct. 228, 102 L. Ed. 2d 218 (1988) 1, 6

Cruz v. Hauck, 515 F.2d 322 (5th Cir. 1975), *cert. denied*, 424 U.S. 917, 96 S. Ct. 1118, 47 L. Ed. 2d 322 (1976) 1, 6, 7, 9, 10

First Iowa Hydro-Electric Cooperative v. Iowa-Illinois Gas & Electric Co., 245 F.2d 613 (8th Cir. 1957) 7, 12

Hill v. Duriron Co., 656 F.2d 1208 (6th Cir. 1981) ... 1, 6, 7

Jenkins v. Sterlacci, 849 F.2d 627 (D.C. Cir. 1988) ... 1, 6

Kobrin v. University of Minnesota, 34 F.3d 698 (8th Cir. 1994) 4

Martin Oil Service, Inc. v. Koch Refining Co., 718 F. Supp. 1334 (N.D. Ill. 1989) 8

Rajender v. University of Minnesota, Civ. No. 4-73-435 (D. Minn. Aug. 13, 1980) 3, 4, 9, 11

Contents

	Page
Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992)	2
Spaulding v. University of Washington, 740 F.2d 686 (9th Cir.), *cert. denied*, 469 U.S. 1036, 105 S. Ct. 511, 83 L. Ed. 2d 401 (1984), *overruled on other grounds*	1
United States v. Conservation Chemical Co., 106 F.R.D. 210 (W.D. Mo. 1985)	7
United States v. Swift & Co., 286 U.S. 106 (1932)	2
Rule Cited:	
Fed. R. Civ. P. 53	5

STATEMENT OF THE CASE

A. Issues Properly Presented by this Petition for Writ of Certiorari.

The circuit courts are uniform in holding that an objection to the appointment of a special master must be made at the time of the appointment or within a reasonable time thereafter or the party's objection is waived. *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1410 (9th Cir. 1990), *cert. denied*, 498 U.S. 1109, 111 S. Ct. 1019, 112 L. Ed. 2d 1100 (1991); *Spaulding v. University of Washington*, 740 F.2d 686, 695 (9th Cir.), *cert. denied*, 469 U.S. 1036, 105 S. Ct. 511, 83 L. Ed. 2d 401 (1984), *overruled on other grounds*; *Cruz v. Hauck*, 515 F.2d 322, 331 (5th Cir. 1975), *cert. denied*, 424 U.S. 917, 96 S. Ct. 1118, 47 L. Ed. 2d 322 (1976). Similarly, the circuits are uniform in holding that objections to a special master are waived where a party objects only after the master files an unfavorable report. *Jenkins v. Sterlacci*, 849 F.2d 627, 634 (D.C. Cir. 1988); *Constant v. Advanced Micro-Devices*, 848 F.2d 1560, 1566 (Fed. Cir.), *cert. denied*, 488 U.S. 892, 109 S. Ct. 228, 102 L. Ed. 2d 218 (1988); *Hill v. Duriron Co.*, 656 F.2d 1208, 1213 (6th Cir. 1981). These cases reflect the courts' desire to avoid rules that provide an incentive to withhold objections until disappointed by an unfavorable result. *Burlington Northern v. Dep't of Revenue*, 934 F.2d 1064, 1069 (9th Cir. 1991). Despite the existence of this substantial and consistent precedent, Petitioner asserts that this case presents the "important procedural question" of when a party waives its right to object to a special master.

Attempting to avoid application of precedent, Petitioner frames the issue presented as whether the federal district court has authority to unilaterally alter the terms of a consent decree. However, this case does not involve nor necessitate an analysis

of the issue of when there is modification of a consent decree. The cases of *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) and *United States v. Swift & Co.*, 286 U.S. 106 (1932) cited by Petitioner do not apply here because there was no motion to modify the consent decree. Neither was there a "refusal" to enforce the consent decree. There was a consent decree, a claim brought under the decree, a trial of the claim by a special master, a recommendation by the special master for judgment against the Petitioner, an objection by Petitioner to the special master failing to convene a three-person panel (himself and two others) to hear the trial of the claim, and a rejection of Petitioner's objection because she failed to raise it until after an unfavorable report had been filed after trial.

The issue then, is not whether there was a sufficient basis for modifying the consent decree, but whether Petitioner waived her objection to the special master hearing her claim at trial because she failed to objeot until after the special master filed an unfavorable report. Similarly, there was no "refusal" by the courts to enforce the consent decree, but rather a rejection of Petitioner's objection because it was untimely. In neither *Rufo* nor *Swift* was there an issue of whether an objection to how the special master carried out the terms of the consent decree had been waived because it was not made until after a decision had been rendered against the objecting party. In cases in which that issue has been addressed, the courts have consistently held that under such circumstances, the objection is waived.

In this case, the lower courts did not consider the issue of whether there was a sufficient basis for modification of the consent decree because there was no motion to modify under consideration. The issue raised and considered below was whether Petitioner failed to timely raise her objection to the special master. Relying on substantial precedent, the courts rejected Petitioner's attempt to cast the issue as one of

modification to the decree and resolved the case properly, on the waiver issue. The Petitioner's objection that the special master unilaterally modified the consent decree was not considered below, and properly so because Petitioner waived her objection by failing to raise it until after she had received an adverse decision from the special master.

Finally, grasping for some support for her petition where none exists, Petitioner frames the issue as one of due process. Petitioner's characterization of her petition in this way is unsupported by any legal precedent, factual assertion or further argument. The vague assertion of a due process issue hardly suffices as support for the petition.

B. Facts Material to the Court's Consideration of the Questions Presented by this Petition.

In 1980, the Respondents settled a class-action sex discrimination suit by entering into a consent decree. *Rajender v. University of Minnesota*, Civ. No. 4-73-435 (D. Minn. Aug. 13, 1980). On September 15, 1989, Petitioner filed a claim of sex discrimination against Respondents under the *Rajender* consent decree alleging sex discrimination in her non-selection to a tenure-track faculty position in Respondents' Department of Comparative Literature. Petitioner had not been advanced for final selection in the hiring process because the search committee determined that her work was not as conceptually rigorous or promising as other candidates. Petitioner argued that her non-selection was based in discrimination because she was better qualified than the male candidate who was chosen for the position. Respondents subsequently elected not to renew Petitioner's annually renewable appointment as a lecturer. Petitioner then filed a second claim under *Rajender*, alleging retaliation.

Respondents moved for summary judgment on both of Petitioner's claims. Respondents' motion was considered by a special master, who recommended that the district court grant summary judgment on both claims. The district court adopted the special master's recommendation and granted summary judgment for Respondents.[1] On appeal, the Eighth Circuit Court of Appeals affirmed summary judgment on Petitioner's retaliation claim and reversed summary judgment on the discrimination in hiring claim, reserving fact issues on that claim for determination at trial. *Kobrin v. University of Minnesota*, 34 F.3d 698 (8th Cir. 1994).

On remand, the parties briefed and argued several pretrial motions to the special master. The case was then tried to the special master from April 3 to April 7, 1995. At the conclusion of the trial, a transcript of the proceedings was prepared at Respondents' expense (pursuant to *Rajender*), and the parties submitted proposed findings and extensive argument to the special master for his consideration. The special master issued a Memorandum Opinion and Recommended Order for Judgment in Respondents' favor on February 28, 1996.

Petitioner filed an objection with the district court to the special master's Recommended Order, arguing that the evidence supported judgment in her favor. Only then did Petitioner object to the special master's consideration of her claims at trial. On her motion to the district court to reject the adverse report of the special master, Petitioner argued for the first time that the case should be remanded for a new trial because the special master heard and decided the trial of her claims rather than convening a three-person panel (himself and two others), as provided by the consent decree.

---

1. Until this time, Petitioner was represented by a lawyer who had represented, and was at that time representing many other *Rajender* claimants. At the time of the appeal of summary judgment, Petitioner's representation changed to her current counsel.

The district court reviewed the trial transcript, the special master's report, and Petitioner's objections and, holding that the factual findings were supported by the evidence and that there was no error of law, affirmed the special master's recommendation that judgment be entered for Respondents. Relying on analogous precedent under Fed. R. Civ. P. 53, establishing that a party who fails to object to a special master until after the special master files an adverse report waives the objection, the district court found that Petitioner had waived her objection to the special master's sole consideration of her claim by failing to timely object. On appeal, the Eighth Circuit Court of Appeals affirmed the decision of the district court, holding that Petitioner had waived any objection to the appointment of the special master because she waited to object until after the special master had filed an unfavorable report. Petitioner's motion for rehearing en banc was subsequently denied. Petitioner then filed this petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

THE ISSUE OF WHEN A WAIVER OCCURS HAS BEEN CLEARLY ARTICULATED BY THE COURTS AND DOES NOT MERIT RECONSIDERATION.

Petitioner argues that her petition should be granted to clarify when an objection must be raised to a special master's failure to follow the terms of a consent decree. Petitioner cites no precedent indicating that there is any dispute among the courts on this issue, and acknowledges that application of substantial precedent under Rule 53 of the Federal Rules of Civil Procedure is dispositive on this issue in this case. Indeed, there is no question nor conflict in the courts as to when a waiver occurs.

> An objection to the appointment of a special master must be made at the time of the appointment or within a reasonable time thereafter, or the party's objection is waived.

Burlington Northern v. Dep't of Revenue, 934 F.2d 1064, 1069 (9th Cir. 1991); *citing Adriana Int'l. Corp. v. Thoeren*, 913 F.2d 1406, 1410 (9th Cir. 1990), *cert. denied*, 498 U.S. 1109, 111 S. Ct. 1019, 112 L. Ed. 2d 1100 (1991); *see also Cruz v. Hauck*, 515 F.2d 322, 331 (4th Cir. 1975), *cert. denied*, 424 U.S. 917, 96 S. Ct. 1118, 47 L. Ed. 2d 322 (1976). Petitioner's characterization of the issue presented by this petition as one determining prerequisites to modification of a consent decree is illusory. Petitioner's case was not decided on that basis, and that issue was not addressed by the courts below. Rather, Petitioner's appeals were rejected on the merits of her discrimination claim, and because Petitioner waived her right to object to the special master when she failed to raise her objection in a timely fashion. The issue of waiver in this case was determined by proper application of substantial precedent, and review of the waiver issue is unnecessary.

On the issue of waiver presented by this case, the law is clear: objections are waived when a party objects only *after* the master files an unfavorable report. *See Jenkins v. Sterlacci*, 849 F.2d 627, 634 (D.C. Cir. 1988); *Constant v. Advanced Micro-Devices*, 848 F.2d 1560, 1566 (Fed. Cir.), *cert. denied*, 488 U.S. 892, 109 S. Ct. 228, 102 L. Ed. 2d 218 (1988); *Hill v. Duriron Co.*, 656 F.2d 1208, 1213 (6th Cir. 1981).

> These cases reflect the court's desire to avoid rules that provide an incentive to withhold objections until disappointed by an unfavorable result.

Burlington Northern, 934 F.2d at 1064.

> To permit such objections after the [master] makes his findings and recommendations would certainly not serve the cause of judicial economy. Parties who did not prevail before the [master] would routinely seek to have the reference set aside for reasons that either could have been corrected or would have stopped the proceedings if promptly brought to the referring court's attention.

Id. at 1069-1070, *citing Hill*, 656 F.2d at 1213. Finding the reasoning of the Fifth Circuit in *Cruz* to be "sound, and consistent with the policy underlying the waiver doctrine," the *Burlington* court agreed that an objection to the appointment of a special master is waived if it is made only *after* the master provides his report and recommendation. *Id.*, *citing Cruz*, 515 F.2d at 331. Otherwise,

> [a] party disappointed with a master's report would be able to obtain a "second bite at the apple" by withholding his objection to the reference until after the report.

Id.; *see also First Iowa Hydro-Electric Cooperative v. Iowa-Illinois Gas & Electric Co.*, 245 F.2d 613, 628 (8th Cir. 1957) (failure to make a timely objection to the appointment of a master either at the time of the order of reference or promptly thereafter constitutes a waiver of error). *See also United States v. Conservation Chemical Co.*, 106 F.R.D. 210 (W.D. Mo. 1985) (a party's motion to revoke the special master's authority was untimely when filed nearly nine months after the order of reference).

Here, as in *Adriana Int'l Corp. v. Thoeren*, no objection to the appointment of the special master was made until well into the proceedings, after numerous meetings, depositions and

hearings with the special master regarding discovery over a period of several months. *Adriana*, 913 F.2d at 1410. Under those circumstances, the court held that Adriana's objection to the special master was not within a reasonable time of the appointment and was therefore waived. *Id.* Similarly, in *Martin Oil Service, Inc. v. Koch Refining Co.*, 718 F. Supp. 1334 (N.D. Ill. 1989), the court denied the appellant's motion to strike the report of a special master made some two and one-half years after the master was appointed to hear the case. The *Koch* court held that the appellant had waived any objection to the special master because appellant had not objected until after the special master's report was issued.

> To hold otherwise would permit parties . . . to base their decisions whether or not to object to a particular special master on the conclusions those appointees subsequently reach. This court cannot condone such manipulation of Rule 53. . . .

Id. at 1338. The *Koch* court noted that the special master served pursuant to court appointment and, therefore, acted "as an extension of the third branch of government." *Id.* at 1338. The court noted further that while special masters perform quasi-judicial functions, unlike the traditional federal bench, they are appointed at the court's behest. "As such, special masters are more like arbitrators whose independence is best safeguarded by the parties themselves *before* the results of the arbitration are made available." *Id.* at 1339. (Emphasis in original.)

II.

THE ELEMENTS OF WAIVER WERE SATISFIED IN THIS CASE.

Petitioner argued below that waiver did not apply in this case because a party cannot waive jurisdiction. Petitioner's argument

on jurisdiction was misplaced because the issue in this case was not whether the special master had jurisdiction to hear her claim, but rather, whether his failure to follow the procedures of *Rajender* mandated a remand for a retrial. By virtue of the district court's jurisdiction over Title VII claims, the special master had jurisdiction over the subject matter of Petitioner's sex discrimination claim, which was brought under *Rajender*. Petitioner's objection was merely to the propriety of the special master hearing the case and making a report and recommendation without convening a panel. Therefore, Petitioner's objection was not to the special master's jurisdiction over her claim, but rather to the method by which her claim was considered. An objection that could be, and was, waived by the Petitioner.

Moreover, Petitioner's invocation of "jurisdiction" as a shield to waiver was rejected in *Cruz v. Hauck*, 515 F.2d at 327, where the court stated:

> Rule 53(a) authorizes a court in which any action is pending to appoint a special master. The district judge, therefore, was empowered to refer the suit to the magistrate subject to the limitations of Rule 53(b). Appellant's contention that the reference was improper is "not a case where a court has exceeded or refused to exercise its jurisdiction"; it is rather a question of whether the judge "erred in ruling on matters within [his] jurisdiction." *La Buy v. Howes Leather Co.*, 352 U.S. 249, 261, 77 S. Ct. 309, 316, 1 L. Ed. 2d 290 (1957).

Id. at 327. The *Cruz* court reasoned further that the judge's reference was within his power, and that a challenge to that order was unlike a challenge to a court's subject matter jurisdiction.

> The latter attacks the essence of the court's powers. An order without power is void; a challenge, therefore, to subject matter jurisdiction may be raised for the first time on appeal.

Id. The *Cruz* court directly rejected Petitioner's argument.

> We see no reason why the parties to the lawsuit, for whose benefit the restrictions [of Rule 53] are imposed, may not waive their objections to a reference.

Id. at 330. Indeed, parties may consent to the use of a master under any circumstance, just as litigants may waive their personal rights to trial under an Article III Judge. *Id.* at 328; *Active Prods. Co. v. A. H. Choitz and Co.*, 163 F.R.D. 274 (D.C. Ind. 1995).

Petitioner also argued that she did not make a knowing relinquishment of her right to have a panel hear her claims because there was no clear, unequivocal, or decisive act on her part amounting to a waiver. However, Petitioner presented legal issues to the special master for his determination, prior to, during, and after the trial, including a motion for summary judgment, motions in limine, and proposed findings of fact and conclusions of law. Having submitted to the jurisdiction of the special master without objection throughout the several years this case has been litigated, Petitioner clearly waived her right to object to the special master sitting as the sole fact-finder on a trial of her claims.

Petitioner argued below that she did not raise her objection before, during or after the trial (until the special master issued his report) because Respondents would not have acquiesced in the appointment of a panel and, therefore, any prior objection

would have been futile. (Hearing Transcript, May 3, 1996, A-100.) Petitioner now speculates further that "what appears to have happened" is that Respondents and the special master simply decided to proceed in this fashion to the prejudice of pro se litigants.[2] Petitioner's arguments fail on many levels. First, Petitioner was not a pro se litigant. She was represented by competent counsel since the inception of her action.

Second, there is absolutely no support for the assertion that there was an agreement between the special master and Respondents, or any unilaterally imposed change in the process of hearing *Rajender* claims. The assertion of these conspiracy theories by the Petitioner is baseless, and designed to deflect attention away from Petitioner's waiver by assigning improper motives to Respondents and the special master.

Third, the implication that Petitioner had no knowledge of *Rajender* procedures and was supposed to be "lead" through the process by the special master, is negated by her arguments on the merits of her discrimination claim, presented to the courts below: that the special master failed to properly apply specific provisions of *Rajender* with regard to the hiring plan supplement and/or ignored additional burdens placed on Respondents under the terms of *Rajender*, to prove that *Rajender* search requirements were followed in good faith. Petitioner's arguments on the merits were based on the interpretation of specific provisions of *Rajender*, indicating Petitioner's access to and knowledge of the *Rajender* consent decree. Furthermore, Petitioner acknowledges that the provision of the consent decree directing the special master to convene a three-person panel is clearly articulated in *Rajender*.

---

2. Petitioner tries to garner the Court's sympathy by arguing that "many of the claimants appear pro se because of the $6,000 cap on recoverable attorney's fees." This, too, is an assertion unsupported in the record and inapplicable to the case at hand in any event.

Finally, Petitioner had numerous opportunities to raise the issue of the special master's consideration of her claim, by formal motion or simply by objection, but failed to do so. *See First Iowa Hydro-Electric Cooperative v. Iowa-Illinois Gas & Electric Co.*, 245 F.2d at 27 (objection to the delegation by the court to the special master "fully and completely waived by the plaintiffs" who had not presented an objection to the trial court in the form of a motion until after the master had held numerous hearings and entered numerous orders and plaintiffs had frequently invoked his jurisdiction). Under the circumstances, Petitioner cannot excuse or deny her failure to object to the special master's consideration of her claim at trial.

CONCLUSION

For the foregoing reasons, Petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

MARK B. ROTENBERG*
General Counsel
University of Minnesota
325 Morrill Hall
100 Church Street S.E.
Minneapolis, MN 55455
(612) 624-4100

JULIE FLEMING-WOLFE
1654 Grand Avenue
St. Paul, MN 55105
(612) 698-1698

Attorneys for Respondents

* *Counsel of Record*